STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re:	)	Docket No. 10-2001-L-0978
	)	
	)	**REVIEW DECISION AND FINAL ORDER**
	)	
	)	
	)	
	)	Referral # *******
Appellant	)	Children's Administration - CPS Review

THE NATURE OF THIS ACTION

Administrative Law Judge (ALJ) Desire S. Hosannah conducted an administrative hearing and issued an Initial Decision on September 6, 2002. On September 27, 2002, the Department filed a petition for review of that decision with the Department's Board of Appeals.

In its petition for review the Department argued:

Comes now the State of Washington, Department of Social and Health Services, Child Protective Services (Department), by and through its attorneys, Christine O. Gregoire, Attorney General, John M. Long, Assistant Attorney General. The Department respectfully petitions for review of the Initial Decision entered in this matter on September 6, 2002, as follows:

I. Issues on Review

The Department of Social and Health Services asserts the Initial Decision from the February 20, 2002, Administrative Hearing is in error in the following respects:

1. Finding of Fact No. 14 incorrectly concludes that the allegations of lack of supervision were eliminated by the Department's September 28, 2001, letter and therefore the only remaining issue is the June 1, 2001, incident.

2. Finding of Fact No. 20 and 21 incorrectly states the evidence presented because the drug treatment program and dismissal of the dependency were subsequent to the founded allegations of neglect due to intravenous methamphetamines use while Appellant was sole caretaker of ******* children.

3. Conclusion of Law No. 5 incorrectly concludes that the Department alleges only physical abuse pursuant to WAC 388-15-130(3)(a)(b) and (e).

4. Conclusion of Law No. 6 incorrectly cites RCW 26.44.020(19) as RCW 26.44.020(12).

5. Conclusion of Law No. 6 also incorrectly concludes that the Department has not met its burden of proving, on a more likely than not basis, that the Appellant engaged in neglectful acts against ******* children based on admitted intravenous methamphetamines use.

6. Conclusion of Law No. 8 incorrectly states that the Department is seeking to circumvent its duty and responsibility to prosecute this matter when exhibits were properly admitted as evidence that clearly met the burden of proof required by law.

7. Conclusion of Law No. 8 also incorrectly concludes that the Department is indirectly seeking to have ALJ Ross' prior order of dismissal nullified by offering exhibits that were properly admitted as evidence at the full hearing and therefore should be reviewed as evidence.

8. Conclusion of Law No. 10 incorrectly states that the Department is asserting the doctrine of collateral estoppel by offering certified court records as exhibits that were admitted as evidence. No collateral estoppel motion was made at the full hearing and the exhibits should be viewed as evidence.

9. Conclusion of Law No. 10 also incorrectly concludes that the Department's properly admitted exhibits would bar the Appellant from challenging the Department's finding of neglect.

10. Conclusion of Law No. 10 also incorrectly concludes that utilizing properly admitted exhibits as evidence of the Appellant's neglect of ******* children is an attempt by the Department to absolve itself from the duty to meet the burden of proof established by law.

11. Conclusion of Law No. 11 incorrectly concludes that the Department is utilizing properly admitted exhibits as evidence as a shield to avoid its legal duty.

12. Conclusion of Law No. 13 incorrectly states that the testimony of the Appellant was uncontroverted when there is overwhelming evidence to the contrary admitted into evidence as exhibits.

13. Conclusion of Law No. 13 also incorrectly concludes that Appellant neither abused nor neglected ******* children because they were not in ******* care after May 14, 2001, when the evidence is clear that the neglect occurred prior to that date.

14. Conclusion of Law No. 13 also incorrectly states that the Department's correspondence to the Appellant indicates that the lack of supervision was not corroborated when the correspondence clearly indicates that it was only not corroborated "by the children."

15. Conclusion of Law No. 13 also incorrectly states that the Appellant's testimony was uncontradicted.

16. Conclusion of Law No. 17 incorrectly states that the Department has failed to meet its burden of proof when the Initial Decision clearly demonstrates a refusal to properly consider admitted exhibits as evidence in support of the Department's finding of neglect.

II. Argument

A. Public Policy Regarding Child Abuse And Neglect.

The legislature has declared that the State of Washington has a competing interest in protecting and promoting the health, welfare, and safety of children. The bond between a child and ******* parent is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent. However, instances of non-accidental injury or neglect by the parent have occurred, and in the instance where a child is deprived of ******* right to

conditions of minimal nurture, health, and safety, the state is justified in emergency intervention based upon verified information. Therefore, the legislature provides for the investigation of such cases by the appropriate public authorities. It is the intent of the legislature that, as a result of such investigations, protective services shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of such children. RCW 26.44.010.

B. Burden Of Proof.

The burden of proof in these administrative proceedings on the founded nature of a referral to Child Protective Services lies with the Department. See RCW 26.44.020. The state has the burden of proving that it is more likely than not that alleged neglect or abuse occurred, as defined under RCW 26.44.020(12) and WAC 388-15-130(3).

C. Statutes and Code Provisions.

RCW 26.44.020(12) defines child abuse or neglect as:

> …the injury, sexual abuse, sexual exploitation, negligent treatment, or maltreatment of a child by any person under circumstances which indicate that the child's health, welfare, and safety is harmed, excluding conduct permitted under RCW 9A.16.100. An abused child is a child who has been subjected to child abuse or neglect as defined in this section.

WAC 388-15-130(3)(f-h) provides a definition of neglectful acts as defined in RCW 26.44.020:

> (f) Failing to provide food, shelter, clothing, supervision, or health care as necessary to a child's health and safety.
> (g) Engaging in actions or omissions resulting in injury to, or creating a substantial risk to the physical or mental health or development of a child.
> (h) Failing to take reasonable steps to prevent the occurrence of (a) through (g).

D. Properly Admitted Exhibits As Evidence.

The Department offered four exhibits at the hearing that were not objected to by the Appellant and were all properly admitted into evidence. The exhibits are as follows and are attached for reference:

Exhibit 1	Dependency Petition – [*******], filed 06/14/01
Exhibit 2	Dependency Petition – [*******], filed 06/14/01
Exhibit 3	Agreed Order of Dependency – *******, filed 09/05/01
Exhibit 4	Dependency Dispositional Hearing Order – *******, filed 09/10/01

All exhibits are certified copies of court records and demonstrate that the Appellant was represented by an attorney in the dependency matter.

Appellant and ******* attorney signed Exhibit NO. 3, the Agreed Order of Dependency, before it was accepted by ******* County Superior Court. On page 1 of this exhibit, the Appellant states that all of the allegations set forth in the dependency are not disputed. The allegations that the ******* agreed to in the dependency proceeding include:

1. April 5, 2001 … ******* was an intravenous drug user … ******* was selling drugs out of the apartment where ******* resided with ******* children [*******] and [*******], ages ******* and ******* …

3. April 19, 2001, … This UA, submitted by ******* on April 20, 2001, tested positive for methamphetamines.

4. April 26, 2001, ******* openly admitted … ******* long term, intravenous abuse of methamphetamines.

7. May 11, 2001, ******* had a substance abuse assessment … ******* reported during the assessment having injected methamphetamines six hours before the assessment.

8. May 11, 2001, … This UA also tested positive for methamphetamines.

9. May 14, 2001, ******* placed both children under the care and supervision of their maternal grandmother, *******.

10. May 16, 2001, ******* entered detox at ******* Recovery Center.

12. May 19, 2001, ******* left ******* Recovery Center though not completing ******* detox and against medical advice.

15. To date, ******* has not followed through with treatment recommendations…

The dependency petitions were filed on June 14, 2001. The Appellant agreed to each and every one of these allegations in Superior Court pursuant to the dependency proceeding. Once admitted here, they became overwhelming evidence in support of the Department's position that these children were neglected due to the failure of the Appellant to supervise and care for ******* children because of ******* intravenous methamphetamines use.

ALJ Hosannah admitted the exhibits at the hearing on February 20, 2002. However, she found that by introducing exhibits that show the Appellant's admitted drug use, the Department was "seeking to circumvent its duty and responsibility to prosecute this matter…." Conclusion of Law No. 8. Quite the contrary, the Department's position is that the evidence presented by exhibits amply demonstrates the Appellant's use of methamphetamines to such a degree that no additional live testimony was needed. Appellant's agreement to the allegations that led to the establishment of a dependency and ******* children being placed outside of the Appellant's home, is sufficient to prove that the neglect allegation as initially investigated is well supported by the evidence.

E. Intravenous Methamphetamines Use While Caring For Children Is Sufficient Evidence Of Abuse Or Neglect.

The primary issue that resulted in a CPS investigative finding of child abuse or neglect is the Appellant's serious methamphetamines addiction. The dependency petition that was filed following the CPS investigation is focused on this issue and the inherent inadequate supervision that results from such illegal drug use. It was further alleged and agreed to by Appellant that ******* was selling drugs out of the apartment where ******* resided with ******* ******* small children.

The dependency petitions and Appellant's subsequent agreement to the allegations contained therein, along with the Dependency Dispositional Order, constituted the evidence that was presented by the Department to support the CPS abuse or neglect finding. The Appellant did not dispute any of the allegations, although ******* had the right to contest the petitions and force the Department to prove them at a dependency fact-finding trial. Those allegations in the Superior Court dependency matter should be taken at face value following the court certified documents as being admitted as evidence to support the Department's investigative finding. The evidence is clear that the Appellant continually used methamphetamines intravenously as demonstrated by positive UA's and ******* admissions. Also that ******* was selling methamphetamines out of ******* apartment. This evidence clearly establishes a sufficient basis for finding that Appellant failed to adequately supervise and protect ******* small children residing with *******. Therefore, the type of drug involvement demonstrated by the dependency documents is sufficient evidence of neglect to support the Department's investigative finding.

F. The Correspondence Between The Department And Appellant Does Not Limit The Scope Or Dates Of The Neglect That Occurred.

After Appellant requested a review of the Department's investigative finding of abuse or neglect, the Department sent a letter on September 28, 2001, upholding their decision. The later stated that, "… although the children did not corroborate (sic) the lack of supervision, there was serious drug involvement that incapacitated your ability to supervise your children [*******] and [*******]."

The Initial Decision incorrectly interprets this to mean that the Department's "allegations as to the lack of supervision were eliminated" because there was "no corroboration of the allegation of the lack of supervision." In fact, all the Department stated in the letter is that the record showed the "children" did not corroborate the lack of supervision. However, even given their lack of corroboration, the letter goes on to say that there was still such a degree of serious drug involvement that it incapacitated the Appellant's ability to supervise ******* children. To conclude that this letter "eliminated" the lack of supervision issue is contrary to the plain meaning of the language in the letter. Such an interpretation is incorrect and therefore the lack of supervision issue was never "eliminated" at all by the correspondence.

The September 28, 2001, letter from the Department to Appellant goes on to say that "(a)ccording to the record, family members indicated that you were passed out, vomiting and hallucinating while [*******] was under your care (on June 1, 2001)." However, the June 1, 2001 date relates to the "passed out, vomiting and hallucinating" incident that was reported and there is nothing to suggest that the date relates to the entire record of drug use and lack of supervision that is in evidence. The evidence demonstrates that the initial referral was received on April 5, 2001, and the facts set forth continue on from that date. There is no language that precludes the Department from proving the abuse or neglect that occurred prior to June 1, 2001. The Department is very aware that placement out of the *******'s home took place on May 14, 2001, although there is no evidence that Appellant did not have visits at ******* apartment following that date. In any event, the evidence sufficiently demonstrates that the Department became aware of Appellant's intravenous methamphetamines use and selling of drugs out of ******* apartment on April 5, 2001 and the children remained in ******* care until May 14, 2001. This evidence is clearly sufficient to uphold the Department's investigative finding of neglect during this period of time. The Department obviously presented no evidence of the June 1, 2001 incident due to the children being removed prior to that date.

The Department is accused of "seeking to circumvent its duty and responsibility to prosecute this matter…" by relying on documents admitted as evidence and not offering live testimony.

There is no rule or statute that requires live testimony as opposed to properly admitted exhibits. The exhibits that were offered become evidence in support of the Department's investigative finding once they are admitted. The initial decision does not address the substance of the documents as evidence, rather only chastises the Department's representative for the tactical decision to proceed without live testimony. There is no basis in law for this conclusion.

The detailed factual evidence that is contained in dependency petitions demonstrates a degree of drug use and involvement that would be inconsistent with adequate supervision and parenting of children of the ages ******* and *******. The Appellant agreed that the allegations were not disputed and a dependency was established in Superior Court based on the same facts. The Department was granted care and custody of the children outside of the Appellant's home by the court based on these same facts. There is no dispute as to what the factual situation was regarding the Appellant and ******* children when the Department began investigating this family on April 5, 2001. Appellant admitted to the same and only contends that those facts did not amount to abuse or neglect. A full review of the evidence, including not only the live testimony but also the evidence admitted as exhibits, clearly demonstrates that the CPS investigative finding is supported by substantial evidence and the Department has met its burden of proof.

III. Conclusion

The evidence in this case should be viewed as a whole including the exhibits admitted. There is no requirement that the Department proceed with live testimony when exhibits admitted as evidence are clearly sufficient to support the Department's investigative finding of neglect on a more probable than not basis. The correspondence between the Department and Appellant does not limit the date of the alleged neglect nor does it limit the scope of the allegations regarding the lack of supervision.

The Initial Decision should be reversed and the Department's finding of neglect should be reinstated.

On October 14, 2002, the Appellant filed a response and argued as follows:

I am writing this letter in response to the child abuse/neglect charges against me that were reversed in a February 2002 hearing and are now being appealed by the Department of Social and Health Services. I disagree with the order to again be reversed and have child abuse/neglect charges against me. I feel that the ALJ found correctly in the February 2002 court hearing when she reversed these charges.

I do not deny that I am a drug addict. However, I am in recovery and have been clean and sober since July 4, 2001. In the last 15 months I have changed all aspects of my life for the better. In December 2001, CPS dismissed our case and I now share joint custody of my ******* ******* [*******] and [*******] with my ex-*******. I have kept a strong bond with my children and I feel that neither do I nor do my ******* deserve to have these child abuse/neglect charges follow us when our lives have changed for the best and we are a very happy family.

I feel that the ALJ was correct and fair in her February 2002 decision. I feel I have proven that I did not neglect or abuse my children. I voluntarily placed my children in my mother's care in May 2001 to get the treatment I needed. I am a good ******* and love my children more than anything in this world. That is a fact that always has been and always will be. I hope that you find that it is fair and correct and these charges not be reversed again and that I do not have

child abuse/neglect charges against me for I never abused nor neglected my *******.

FINDINGS OF FACT

1. ******* is the mother of [*******] and [*******], who were ages ******* and *******, respectively, at the time the alleged incidents of neglect were found to have occurred by the Department in this proceeding.

2. At the time of the alleged incidents ******* was an admitted intravenous methamphetamines user, who had not, at that time, consistently followed through with drug addiction treatment.

3. The parties have stipulated that on May 14, 2001, the Appellant voluntarily placed [*******] and [*******] with ******* mother, *******. Therefore, From May 14, 2001, the children were out of the Appellant's care, control, and supervision.

4. In April 2001, the Department initiated an investigation of allegations of neglect by the Appellant after receiving a referral *on April 5, 2001,* that the Appellant was an intravenous drug user with track marks *on ******* arms and hands and that ******* was selling drugs out of the apartment where ******* resided with ******* children.*

5. On July 30, 2001, a CPS supervisor at the Department of Social and Health Services sent a certified letter to the Appellant stating that on or about April 5, 2001, Child Protective Services (CPS) received a report alleging physical abuse or neglect of a child. The letter went on to say that CPS had completed an investigation of the report and determined that the allegations of physical neglect/failure to provide proper supervision was founded.

6. Specifically, the July 30, 2001, letter stated, *in relevant part*:

According to the investigation, the allegation(s) of Physical Neglect-Failure to Provide Proper Supervision is/are founded, meaning that the allegations more likely than not did occur. This decision is based on the following definition sections of the Washington Administrative Code (WAC) 388-15-130(3):

…

(f) Failing to provide food, clothing, supervision, or health care necessary to a child's health or safety,

…

In regard to failure to provide proper supervision, it is reasonable to infer that there were deficits in supervision that placed the children at risk as a result of *******'s use of and involvement with methamphetamines. [*******]'s statements to ******* establish that while ******* played outside with ******* ******* year old [*******] while ******* mother remained in the apartment. On 6/1/01, it was established that ******* had [*******] under ******* care when ******* had a self-described, debilitating illness ("cotton fever") resulting from ******* injecting methamphetamines. Family members describe ******* being passed out, vomiting and hallucinating during this illness, during which time ******* had the child under ******* exclusive care.

7. Subsequently, on June 14, 2001, the Department of Social and Health Services – Child Protective Services Division filed dependency petitions regarding the Appellant's *******, [*******] age ******* at the time of the alleged incidents, and [*******], age ******* at the time of the alleged incidents *in the Superior Court of the State of Washington, in and for the County of *******, Juvenile Division*. With respect to ******* children, the dependency petitions alleged that they were abused or neglected *as defined in Chapter 26.44 RCW* and *that they* had no parent, guardian, or custodian capable of adequately caring for them, *such that they were in circumstances which constitute a danger of substantial damage to their psychological or physical development. The Department based ******* children's dependency petitions on the following facts:*

1. *04/5/01 Referral was received reporting that ******* was an intravenous drug user with "track marks on ******* arms and hands." It was further alleged that ******* was selling drugs out of the apartment where ******* resided with ******* children [*******] and [*******], ages ******* and *******.*
2. *4/19/01 ******* refused to show the investigating CPS worker ******* arms to refute or confirm the allegations of intravenous drug use.*
3. *4/19/01 ******* agrees to provide a UA at the request of the CPS social worker. This UA, submitted by ******* on 4/20/01, tested positive for methamphetamines.*
4. *4/26/01 ******* openly admitted and described to the CPS social worker ******* long term, intravenous abuse of methamphetamines. *******

*reported that ******* was addicted to methamphetamines and ******** requested treatment.*

5. *4/26/01 ******* was referred to ******* Treatment Center for a substance abuse assessment.*
6. *5/3/01 ******* missed ******* scheduled assessment at ******** Treatment Center. The assessment was rescheduled for 5/24/01.*
7. *5/11/01 ******* had a substance abuse assessment at ******* Recovery Center. ******* Recovery Center informed CPS social worker that ******* reported during the assessment having injected methamphetamines six hours before the assessment.*
8. *5/11/01 ******* submitted a UA at ******* Recovery Center in conjunction with the ******* Recovery Center Assessment. This UA also tested positive for methamphetamines.*
9. *05/14/01, ******* placed ******* children under the care and supervision of their maternal grandmother, *******.*
10. *5/16/01, ******* entered detox at ******* Recovery Center.*
11. *05/17/01 Assessment report from ******* Recovery Center recommends inpatient substance abuse treatment for *******.*
12. *5/19/01 ******* left ******* Recovery Center though not completing ******* detox and against medical advice.*
13. *05/24/01 ******* completed an initial substance abuse assessment at ******* Treatment Center.*
14. *05/30/01 ******* missed ******* recall/follow up appointment with ******* Treatment Center.*
15. *To date, ******* has not followed through with treatment recommendations. Specifically, that ******* utilizes outpatient treatment with actively pursuing ADATSA inpatient services.*
16. *06/01/01 ******* reported to CPS social worker a period of abstinence of approximately one week after leaving detox/inpatient care at ******* Recovery Center on 5/19/01. This was corroborated by a clean UA submitted by ******* on 5/22/01 at the request of CPS.*
17. *6/1/01 ******* described to the CPS worker having relapsed on/about 5/25/01. ******* reported that ******* was severely ill for two days after contracting "cotton fever." ******* described that methamphetamines is drawn through cotton fibers prior to injection. When small fibers of the cotton are inadvertently injected along with the drug, the illness ******* described experiencing results.*
18. *06/07/01 Assessment report from ******* Treatment Center recommends inpatient substance abuse treatment for *******.*
19. *To date, ******* has not followed through with treatment recommendations, from by ******* Treatment Center and ******* Recovery Center. Specifically, that ******* utilizes outpatient treatment while actively pursuing ADATSA inpatient services.*
20. ******* is involved in ******* of the children's lives and is both a financial and emotional support.*
21. ******* is not known as a financial or emotional support to ****** alleged child [*******].*
22. *******'s criminal history involves: 1992 Forgery and probation/supervision violation, 1993 three charges of assault 4 and driving while license suspended or revoked, 1994 Vucsa-Heroin and two charges of Vucsa-manufacturing/delivery.*

23. That the following reasonable efforts have been taken to prevent out-of home placement: Substance abuse assessments, inpatient substance abuse detox, UA's, case management and risk assessment tool. :

~~8. The petitions alleged that the Appellant was a drug user and that ******* had placed ******* children in the care of ******* mother on May 14, 2001.~~

~~9. Neither dependency petition alleges that the Appellant was passed out, vomiting, and hallucinating while [*******] was under ******* care.~~

10. The July 30, 2001, letter *from CPS* informed the Appellant of ****** options if ******* disagreed with the founded report of child abuse or neglect by the Department, which included the right to request a Department review of the founded report by the Area Administrator, Sophie Kouidou-Giles. The Appellant made this request for a departmental review.

11. During the pendency of the administrative process, on September 5, 2001, in the ******* Juvenile Department of the Superior Court, the Appellant and the Department entered into an Agreed Order of Dependency *as to* ******* regarding [*******] and [*******].

12. *In the Agreed Order of Dependency as to *******, the court found that none of the Department's 23 allegations of dependency were disputed. The court also found that the efforts made by the Department to prevent or eliminate the need for removal of the children from the *******'s home had been unsuccessful because the health, safety, and welfare of the children could not be adequately protected in the home. The court concluded and ordered that the children were dependent pursuant to RCW 13.34.030(5)(c). This Agreed Order of Dependency as to ******* was signed by the Appellant and by ******* attorney.* ~~The agreed order stated that the allegations of dependency were not disputed. However, while the agreed order refers to 23 allegations and ******* children, only [*******]'s petition has 23 allegations of dependency. A review of ******* children's dependency petitions reveal that with respect to allegations 1 through 19 they are identical, and with respect to allegations 20 through 23 contained in [*******]'s dependency petition, these allegations relate to the appropriateness of the children's placement~~

~~with *******, the Appellant's spouse; with a ******* ([*******]'s alleged father) and ******* criminal record and resulting inability to care for the children; and the reasonable efforts taken by the Department to prevent and out-of-home placement.~~

13. On September 28, 2001, Area Administrator Sophie Kouidou-Giles of the Department of Social and Health Services, sent a letter to the Appellant, which stated, *with emphasis added:*

> *You were named as a responsible person of alleged child abuse or neglect in a referral to CPS. A CPS social worker has investigated that referral and made a founded report of child abuse or neglect. Pursuant to RCW 26.44.125, you requested that I review that founded report. I have now had an opportunity to conduct a review of the social worker's investigation and resulting finding(s).* ***Based on that review, I have concluded that the finding of abuse or neglect is correct. No changes to that finding will be made****.*
>
> *I have reviewed your comments regarding the social worker's handling of the case. My comments are as follows:*
>
> In reviewing the record, it appears that although the children did not corraborate [sic] the lack of supervision, there was serious drug involvement that incapacitated your ability to supervise your children, [*******] & [*******]. According to the record, family members indicated that you were passed out, vomiting and hallucinating, while [*******] was under your care ~~[on June 1, 2001].~~

~~14. Thus, the allegations as to the lack of supervision were eliminated because the Department's September 28, 2001, letter specifically acknowledged that there was "no corroboration of the allegation of the lack of supervision." Therefore, the remaining issue is whether the alleged June 1, 2001, incident is supported by the evidence.~~

15. The September 28, 2001, letter advised the Appellant that ******* could request an administrative hearing to challenge the Department's determination.

16. On October 8, 2001, the Appellant timely filed a request for an administrative hearing with the Office of Administrative Hearings. In ******* request, the Appellant stated:

> To Whom It May Concern:
>
> I would like to request an administrative hearing regarding the charges against me for child abuse/neglect.

> Due to the allegations against me that I was "passed-out, vomiting and hallucinating" while my ******* [*******] was under care, are false. ….

17. In November 2001, the Department moved for dismissal of the Appellant's administrative hearing on the basis that the issues in this matter had already been resolved against the Appellant in the dependency proceedings. On December 26, 2001, an Order Denying the Department's Motion for Summary Judgment was issued by Administrative Law Judge Rebekah R. Ross. In her decision, Administrative Law Judge Ross determined that the Department improperly relied upon the doctrine of collateral estoppel in making its motion for summary judgment due to the fact that the Appellant's dependency proceeding had been resolved by agreed settlement rather than litigated upon the merits.[1] The Department did not appeal Administrative Law Judge Ross' decision or seek reconsideration of her order. Instead, this matter went to a full administrative hearing on the merits on February 20, 2002.

18. At the February 20, 2002 hearing, the Department submitted certified copies of ******* of the children's dependency petitions filed June 14, 2001, a copy of the Agreed Order of Dependency as to the *******, filed September 5, 2001, and a copy of the Dependency Dispositional Hearing Order as to the *******, filed September 10, 2001.[2]

19. The Department's attorney representative did not call any witnesses to testify on behalf of the Department and did not offer any testimony to contradict any of the Appellant's testimony during the hearing.

20. The Appellant credibly testified that ******* children were not in ******* care as of May 14, 2001, and that they have not resided with ******* since that date. The Appellant further testified that ******* disputed all of the allegations contained in the Child Protective Services documents regarding ******* allegedly engaging in behavior that would constitute abuse and/or neglect of ******* children. The Appellant acknowledged having a drug problem but credibly testified that ******* attended and completed a drug treatment program for ******* addiction and

[1] See Order Denying Department's Motion for Summary Judgment Dismissal attached as Exhibit 7.
[2] See Exhibits 1 through 6.

that ******* is now drug free. The Appellant offered further uncontroverted testimony that the dependency proceedings against ******* had been dismissed some time in January of 2002.

21. The Department stipulated to the fact that the Appellant had completed a drug treatment for ******* drug addictions and that the dependency proceedings had been dismissed.

22. ~~Despite having ample opportunity to do so, the Department failed to produce or offer testimony from any witnesses to substantiate the allegations regarding the alleged June 1, 2001, incident and no witness testimony as to any other allegation against the Appellant was offered by the Department. The Department's attorney representative stated that he would simply rely on the documents submitted by the Department regarding the dependency petition to support the Department's case in the administrative proceeding.~~

CONCLUSIONS OF LAW

1. The Department's petition for review was timely filed and is otherwise proper. WAC 388-02-0575. Jurisdiction exists for the undersigned Review Judge to review the initial hearing decision and issue the final agency decision in this matter.

2. In administrative hearings involving a CPS finding that a person has abused or neglected a child, the authority of the undersigned to modify the initial hearing decision has been limited by Department rule. RCW 34.05.464(4) notwithstanding, the undersigned may modify an initial decision only when there has been an irregularity in the proceedings; when the findings of fact are unsupported by substantial evidence in the record; when there is a need for additional consistent findings of fact based upon substantial evidence in the record; when there is a need for clarification in order to implement the decision; or when it is necessary to correct an error of law. WAC 388-02-0600(2) and RCW 34.05.464(4).

3. The undersigned has deleted the children's names in the petition for review and in the Initial Decision's findings of fact because reviews and hearings conducted under RCW 26.44.125 are confidential and not open to the public. RCW 26.44.125(5). The undersigned has also modified the Initial Decision's findings of fact within the limitations of WAC 388-02-

0600(2). Material added to the findings has been italicized. Material deleted from the findings has been struck through. Specifically:

Findings of Fact 8 and 9, which were summaries of the allegations underlying the two dependency petitions, were deleted because the undersigned set the allegations out in full.

Finding of Fact 12 was deleted in part because it contained the ALJ's analysis of the contents of the Agreed Order as to *******, as opposed to a summary of the language in this order or the actual language of the order. This finding was augmented by the undersigned to summarize the court order.

Finding of Fact 14 was deleted because it was actually a conclusion of law, not a finding of fact, and as a conclusion of law, it was erroneous. The Department's July 30, 2001, letter to the Appellant notifying ******* of the founded neglect finding and the basis of that finding is the adverse notice the Department served that gives the Appellant hearing rights. The subsequent letter from Ms. Sophie Kouidou-Giles did not change either the founded neglect finding or the basis of that finding, which was the Appellant's alleged failure to provide supervision to ******* children that was necessary to their health or safety, under WAC 388-15-130(3)(f).

Finding of Fact 22 was deleted because it was just the ALJ's comments on the evidence presented, not a finding as to any contested factual matter.

4. Many of the Initial Decision's Conclusions of Law are wrong as a matter of law and are not adopted. Specifically:

Conclusion of Law 4 is not adopted because this case is governed by WAC 388-15-130(3)(f), the regulation the Department cited in its adverse notice as relying upon. WAC 388-15-130(3) is the first source of law in a Department hearing involving a CPS finding of physical abuse, and this regulation must be applied to the facts in this case. If the Department has no regulation that addresses the issue being administratively decided, then and only then may the Administrative Law Judge or the Review Judge look at definitions contained in state statutes or look at other sources of law in order to decide the case. WAC 388-02-0220.

Conclusion of Law 5 is modified to delete the last sentence, which states, "In this case, the Department alleges physical abuse pursuant to WAC 388-15-130(3)(a)(b) & (e)." At no time has the Department alleged that the Appellant physically abused ******* children; at no time has the Department based it's neglect finding on subsections (a) or (b) or (e) of WAC 388-15-130(3). At all times, the Department has alleged that the Appellant neglected ******* children by failing to provide supervision necessary to their health or safety, under subsection (f).

Conclusions of Law 7, 8, and 16 are not adopted as they consist solely of the ALJ's criticism of the case the Department presented at hearing. This criticism is both gratuitous and dicta.

Conclusions of Law 9, 10, 11, and 12 are not adopted because they simply restate ALJ's Ross's holding in an earlier administrative order to the effect that the Department cannot rely upon the doctrine of collateral estoppel to prove its case, and they are irrelevant to the outcome of this hearing on the merits.

The last two sentences of Conclusion of Law 13 are not adopted because they are based on the ALJ's erroneous conclusion that the Department's September 28, 2001, letter to the Appellant somehow modified the basis of CPS' finding of neglect against the Appellant.

Conclusions of Law 14 and 15 are not adopted because they are inconsistent. If the ALJ concludes that family statements quoted in the Department's September 28, 2001, letter to the Appellant constitute inadmissible hearsay, then the ALJ cannot go on and conclude that the acts that these statements allege happened never happened. Moreover, the statements contained in the September 28, 2001, letter are simply allegations that make up part of the pleadings, not evidence of the facts asserted therein.

5. The undersigned's modifications to the Initial Decision's findings of fact and conclusions of law notwithstanding, the initial decision is still correct as to outcome. The Department has not met its burden of proving that the Appellant failed to provide supervision to ******* children that was necessary for their health or safety. The 23 factual statements that the

Department based its dependency petitions upon, even if agreed to by the Appellant, do not prove that the Appellant failed to provide the supervision necessary to ******* children's health or safety. At best, these 23 factual statements create inferences. And the Department's July 30, 2001, substantiated neglect finding acknowledges that the only evidence the Department has is inferences, i.e., "In regard to failure to provide proper supervision, it is reasonable to infer that there were deficits in supervision that placed the children at risk as a result of *******'s use of and involvement with methamphetamines."

6. Inferences alone do not provide the evidence the Department needs to prove its case. For example, the inferences do not establish what methamphetamines are or how they could impact a user's ability to supervise children. The inferences do not establish who all lived in the Appellant's apartment while ********* was using methamphetamines or whether there was there another adult present, such as a spouse, a neighbor, a babysitter, or the Appellant's mother available to care for the children during those times, if any, when the Appellant couldn't. The 23 agreed upon factual statements in the dependency petitions do not address any negligence on the Appellant's part or any failure by ******* to adequately supervise ******* children. In its Agreed Order of Dependency as to *******, the court concluded that the Appellant's children were dependent children pursuant to RCW 13.34.030(5)(c) (children who have no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development). The court did not conclude that they were dependent children pursuant to RCW 13.34.030(5)(b) (children who are abused or neglected as defined in chapter 26.44 RCW by a person legally responsible for the care of the children). The initial decision shall be affirmed.

7. The procedures and time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

DECISION AND ORDER

The Initial Decision is affirmed.

Mailed on January 3, 2003.

CHRISTINE STALNAKER
Review Judge

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: *******, Appellant
John Long, AAG's Office, Dept's Representative
Carole Clark, Program Administrator, *******
Rosalyn Oreskovich, Asst. Sec. Children's Admin, *******
Desire Hosannah, ALJ, ******* OAH